EX PARTE OR LATE FILED

Sprint.

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EX PARTE PRESENTATION

December 4, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-128

Dear Ms. Salas:

Enclosed for filing in this docket are two copies of a letter to Lawrence Strickling of the Common Carrier Bureau on behalf of Sprint Corporation, in response to the RBOC/GTE/SNET Coalition's letter of November 17. Please include the letter in the record of this proceeding.

Sincerely,

Richard Juhnke

Enclosure

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December 4, 1998

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Re: CC Docket No. 96-128

Dear Mr. Strickling:

On behalf of Sprint Corporation, this is in response to Michael K. Kellogg's November 17, 1998 letter to you on behalf of the RBOC/GTE/SNET Payphone Coalition ("the Coalition") regarding payment of per-call compensation where resale carriers are involved. In its letter, the Coalition asks for Commission confirmation of its interpretation of prior Commission orders regarding the extent to which underlying carriers must pay compensation on behalf of their reseller customers and, in addition, suggests that the Commission change the rules regarding this issue in the course of the pending reconsideration proceeding. As will be discussed below, the Coalition's letter is improper as a matter of procedure and wrong as a matter of substance.

Before addressing those infirmities, Sprint wishes to make clear that it is using its best efforts to ensure that the compensation it pays to payphone service providers (PSPs) is fully consistent with its obligations under the Commission's orders in CC Docket No. 96-128. The Sprint personnel responsible for payphone compensation are more than willing to work with PSPs to investigate and resolve issues that may arise. In fact, Sprint has engaged in this process with a number of PSPs. However, although the Coalition states (at 1) that "the amount of compensation received from some of the major interexchange carriers has been from 20 to more than 50 percent less than the amount that coalition members expected based on their own records,"[1] Sprint has had very little complaint from the members of the Coalition regarding the level of compensation paid by

[1] It may be that the Coalition members' expectations are misguided. Since they cannot know whether calls reaching calling card and operator services platforms are "completed" for purposes of per-call compensation, they may be overestimating the amount of compensation they believe they are due.

Sprint. As far as I have been able to ascertain, Sprint has been contacted by just two members of the Coalition regarding possible compensation shortfalls. One made a vague expression of disappointment with the amount of compensation, and has not followed up the matter. In the other case, one operating company of one of the Coalition members stated that the amount of compensation from Sprint was roughly 25 percent less than it had expected. After investigation, Sprint reported back that it appeared that 20 of the 25 percentage points related to traffic from switch-based resellers, and Sprint has not heard from this PSP since.

Sprint also can assure the Commission that it has no interest in shielding its switch-based reseller customers from their obligation to pay compensation to PSPs. Although these resellers are our customers, they are also our competitors, and if they were to evade their compensation responsibilities, that would only put Sprint's retail services at a competitive disadvantage with those of its reseller customer/competitors.

Both of the forms of relief the Coalition letter requests are procedurally improper. First, the request to confirm the Coalition's interpretation of existing obligations of underlying carriers with respect to reseller customers is, in effect, a request for a declaratory ruling. The accepted way to pursue such requests is to file a petition for declaratory ruling. It is the Commission's practice to place such petitions on public notice and allow opportunity for comment by any affected member of the public. For the Commission or the Bureau to act instead on the basis of an ex parte letter, copied to counsel for only five of the several hundred long distance carriers, would not only be irregular as a matter of procedure but also would be unfair to other carriers whose rights and obligations would be affected by the requested relief and who have no notice that the issue has been raised and no opportunity to comment before the Commission acts.

The Coalition's additional request that the Commission change the criteria for when an underlying carrier must pay compensation on behalf of a reseller, in the pending reconsideration/remand proceedings, also invites the Commission to commit reversible procedural error. The determination of which carriers are obligated to track payphone calls and compensate PSPs was decided more than two years ago in the Commission's November 8, 1996 Order on Reconsideration (11 FCC Rcd 21233). Although the issue of which carriers should have to pay interim per-line compensation was appealed and remanded in Illinois Public Telecommunications Association v. FCC, 117 F.3rd 555 (D.C. Cir. 1997), the issue of which carriers are obligated to pay per-call compensation was not appealed. Thus, it was not addressed in the Second Report and Order, 13 FCC Rcd 1778 (1997), on which petitions for reconsideration are still pending, nor was this issue raised in the June 19, 1998 Public Notice (DA 98-1198), seeking comment in response to the remand of the Second Report and Order in MCI Telecommunications Corp. v. FCC, 143 F.3rd 606 (D.C. Cir. 1998). For the Coalition to invite the Commission to use a

forthcoming order on reconsideration/remand to change rules that have been unappealed and final for more than two years, without initiating a new notice and comment rulemaking, would simply lead to reversible error.

Despite the procedural infirmities of the Coalition's letter, Sprint will not leave the substance unaddressed. With respect to the existing payment obligations, the Coalition correctly notes that the first Report and Order in CC Docket No. 96-128 required "facilities-based" carriers to pay on behalf of "resellers." This obligation was challenged by several carriers (see Order on Reconsideration, 11 FCC Rcd at 21272-73), and rather than maintaining a distinction between "facilities-based carriers" and "resellers," the Commission on reconsideration instead determined (id. at 21277) that "a carrier is required to pay compensation and provide per-call tracking for the calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier." Thus, the new dividing line was not between facilities-based carriers and resellers generally, but rather between switch-based carriers (who are obligated to perform their own call-tracking and compensation) and switchless resellers (who are not and whose calls must be tracked and compensated by their underlying carriers).

Rather than accepting the plain meaning of these words, the Coalition (at 3) interprets this order as maintaining an obligation on facilities-based carriers to pay compensation on behalf of all their reseller customers unless a particular reseller "explicitly accepts the obligation to pay." Nothing in the Order on Reconsideration remotely supports such a construction.[2] The Order on Reconsideration does not require any carrier to somehow "explicitly accept[]" its obligation to pay compensation, nor does it make other carriers responsible for paying compensation of any carrier that does not do so. Furthermore, there is nothing for any carrier to "explicitly" accept. The Commission's rules are binding on all carriers and all carriers have a legal obligation to comply with them. If Sprint could be relieved of its nine-figure compensation obligation simply by not "explicitly accept[ing]" such an obligation, it would gladly do so.

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[2] The Coalition, in an earlier letter to Sprint and other IXCs, asserted that the reference in the Order on Reconsideration to carriers having their "own switching capability" meant to refer only to carriers that also had the ability to track and pay compensation. That was also a clear misreading of the Order on Reconsideration, which explicitly acknowledged that some switch-based carriers might have technical difficulty in tracking calls and paying compensation but stated that in such cases they could fulfill those obligations by contracting out this duty to another entity. See Order on Reconsideration, 11 FCC Rcd at 21277. Sprint assumes that the Coalition's failure to reiterate this argument in their November 17 letter means that they are no longer pressing this fallacious misinterpretation of the Commission's orders.

The only support the Coalition offers for its interpretation of the Order on Reconsideration is a reference to an Order released April 3, 1998 by the Chief of the Common Carrier Bureau (DA 98-642), which made mention of resellers that "have identified themselves as responsible for" compensation. The phrase on which the Coalition relies appears in the following sentence in ¶38 of that Order:

> When facilities-based IXCs providing 800 service have determined that they are not required to pay compensation on particular 800 number calls because their switch-based resale customers have identified themselves as responsible for paying the compensation, the facilities-based carriers must cooperate with PSPs seeking to bill for resold services.

The clear import of that sentence, and the balance of ¶38, is that IXCs should cooperate with PSPs in identifying the carrier responsible for paying compensation on calls to a particular 800 number. There is no indication that the Bureau intended an interior phrase in that sentence to alter the fundamental payment responsibilities set forth in the Commission's Order on Reconsideration. The Coalition's misinterpretation of the April 3 Order is underscored by the fact that the order was issued nearly six months after per-call compensation took effect, and more than a year and a half after IXCs were first directed to prepare per-call compensation systems. Sprint built its tracking and compensation system in good faith reliance on the scope of compensation for which it is liable, as set forth in the Commission's orders, and it strains credulity to believe that the Bureau intended to significantly change the rules of the game six months after per-call compensation went into effect.

Furthermore, the Bureau's Order could not, as a matter of law, have the effect the Coalition ascribes to it. The Commission's orders in this proceeding have been entered pursuant to notice and comment rulemaking proceedings, and as discussed above, those rules can be substantively altered only after giving notice and opportunity for comment. Moreover, only the Commission – not the Bureau – can take substantive action in rulemaking proceedings. See 47 CFR §0.301(g). In short, the Bureau's April 3 Order cannot alter the payment obligations imposed on switch-based resellers by the full Commission in the Order on Reconsideration.

The Coalition's interpretation of existing orders would not be a sound dividing line to adopt in any event. It does not explain to whom the resale carrier must identify itself – to PSPs, to the Commission, or to other IXCs – nor does it indicate the process by which this should be done. Moreover, there is no reason for the Commission to burden a particular IXC with additional tracking and compensation obligations merely because one

of its resale carriers unilaterally decides not to accept the obligations that are placed upon it by Commission orders.

The Coalition advances yet another interpretation of the existing rules on p. 4 of its letter, where it contends that the Commission orders place the responsibility for payment on the owner of the "first switch" to which a call is routed unless some other carrier "expressly identifies itself to the PSP as having the obligation... ." It is not entirely clear from the Coalition's letter how it defines "switch" for these purposes. The first switch to which a call is routed is typically the local carrier's end office switch. But surely that cannot be what the Coalition intends, because the Commission has made clear from the outset that the tracking and compensation responsibilities are not on the local exchange carrier on the originating end of a call. See Report and Order, 11 FCC Rcd 20541, 20590 (1996). Nor can the Coalition point to any reference to its "first switch" terminology in any of the Commission orders in this docket. Placing the obligation on the carrier owning the "first interexchange switch" would create further complexities for IXCs in administering per-call compensation. PSPs are due compensation only on calls that are completed to an end-user number, and the "first interexchange switch" carrier has no direct way of ascertaining whether a call delivered to one of its switch-based reseller customers terminates on a "platform" (such as a calling card or operator services platform) and if so, whether the call from that platform is ever completed to an end user number. Thus, shifting the compensation responsibility to the "first interexchange switch" carrier would put that carrier in the middle of inevitable disputes between its switch-based reseller customers and PSPs about whether the carrier is correctly estimating the number of completed calls. If the carrier paid PSPs for every call that appears (to that carrier) to be completed, the PSPs would be overpaid, and undoubtedly, the switch-based resellers would resist full reimbursement of the carrier of its payments to PSPs.[3] And that is why the existing Commission rule, adopted in the Order on Reconsideration, makes the most sense: it places the responsibility for payment on the carrier that is in the best position to be able to accurately count the number of completed calls.[4]

[3] Indeed, as discussed above (n.1), the inability of the "first switch" carrier to be able to accurately track and count completed calls may be a reason why the Coalition claims that it is due more compensation than it has been receiving – the Coalition may be counting completed calls to a platform as if they were "completed" for purposes of compensation.

[4] The Coalition (n.6 at page 5) alleges, without offering any support, that IXCs may strip off the info digits before passing the call onto a reseller. That is not true in Sprint's case.

The present rule does not impose inordinate burdens on PSPs seeking payment. There are several sources of information as to the identities of long distance carriers, and it should be a relatively simple matter for PSPs to get in touch will all such carriers. If any carrier claims that it is not paying compensation directly because it is a switchless reseller and that underlying carriers are paying on its behalf, the PSPs can easily confirm this assertion with the underlying carrier identified by the reseller. If a PSP believes that a particular carrier may be generating so little traffic that the cost of tracking down the carrier and sending it a quarterly statement outweighs the compensation it might expect from that carrier, it is certainly the PSP's right to forego that compensation for its own convenience. However, the administrative burdens on PSPs from the FCC's rules appear to Sprint to be far less onerous than the tracking and compensation burdens that the Commission has placed on Sprint and other switch-based carriers. If the Coalition believes that the current compensation scheme is "unworkable" (Coalition letter at 3), then perhaps it should reconsider its opposition to caller-pays compensation, which would eliminate all the administrative complexities here involved for the carriers, the PSPs and indeed the Commission itself.

As a future rule, the Coalition advocates (at 5-6) placing the obligation for payment on the carrier identified by the CIC associated with the called number. The Coalition appears to assume that only switch-based resellers have CICs.[5] That is not the case. Many switchless resellers have CICs as well, and the Coalition utterly fails to address the feasibility of requiring these switchless reseller to track and pay compensation. In addition, switchless resellers that have CICs often do not activate them nationwide. The Coalition fails to address how its proposal would work in such cases.

Moreover, because of the administrative burdens involved in per-call tracking and compensation, differentiating between resellers having CICs and those who do not would serve as a powerful inducement for resellers not to obtain their own CICs. Yet, such an inducement would have perverse public interest effects in other respects. For example, at least some apparent "slamming" is simply the result of customer confusion: the LECs often misidentify a consumer's IXC because the IXC chosen by the consumer is a "CIC-less" reseller. Thus, the consumer may believe he or she has been "slammed" by the reseller's underlying carrier when that is not in fact the case. If all resellers had CIC codes, this confusion would be eliminated. Accordingly, there may be significant public interest reasons for encouraging resellers to obtain CICs, rather than discouraging them from doing so – a natural consequence of the Coalition's proposal.

[5] Thus, the Coalition states (at 5) that "getting a CIC is one...way for a switch-based reseller to "identify" itself... .

If the Commission declines to adopt a caller-pays system, then, in Sprint's view, it should either adhere to the rules adopted in the Order on Reconsideration or impose tracking/payment responsibilities on all carriers, so that no carrier is obligated to compensate on behalf of any other carrier, and so that no reseller will have an incentive to relinquish its CIC in order to avoid the tracking/payment obligations. In any case, if the Commission is inclined to redefine tracking/payment obligations, it must first conduct a notice and comment rulemaking, not just because (as discussed above) such action is required by law, but also because a rulemaking is needed to develop a sound evidentiary record on which to base a decision. All affected segments of the industry, and interested members of the public, should be heard on the costs, implementation periods required, and technical or other problems that may be involved in altering the current rules.

In conclusion, Sprint does not believe that the Bureau needs to take any action on the Coalition's procedurally improper November 17 letter. At most, the Bureau should simply advise the Coalition that if it wishes to confirm a particular interpretation of the existing Commission orders in this docket, it should do so through a petition for declaratory ruling, and if it seeks a change in those orders, it should do so through a petition for rulemaking.

Sincerely,

Richard Juhnke

c: Richard Cameron
Greg Lipscomb
Milton Price
Glenn Reynolds
Mark Siefert
Craig Stroup
Michael Kellogg
Rachel Rothstein
Richard Rubin
Michael Shortley
Mary Sisak